IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	CRIMINAL ACTION NUMBERS
v.	)	
	)	IN-07-06-0042-R1
ANTOINE MURRAY	)	
	)	
Defendant	)	ID NO. 0705023337

Submitted: October 8, 2008
Decided: January 21, 2009

MEMORANDUM OPINION

Upon Motion of the Defendant
for Post-Conviction Relief - ***DENIED***

HERLIHY, Judge

Defendant Antoine Murray has moved for post-conviction relief claiming ineffective assistance of counsel in the plea process and a misleading TIS Guilty Plea form. This judge accepted his plea. He pled guilty on November 26, 2007 and was sentenced on February 1, 2008.

Murray's Claims

Murray advances three grounds in support of his motion. First, he contends the plea agreement was "unfulfilled." He says the TIS Guilty Plea form gave him the impression he would face a minimum of two years. He also argues that because he was facing habitual offender status, the maximum potential penalty should have stated "life" not eight years.

Second, Murray claims his counsel advised him to accept the plea because he already had eight months in jail and would be out in a year (based on a two-year sentence). Also, in this second claim, Murray reports that counsel told him that if he went to trial and were convicted he could get a twelve year sentence instead of two years because of a weapons charge, and if he pled, the State would drop the weapons charge. All of this, Murray stated, prompted his lawyer to advise him that accepting a plea would result in only a two year sentence on the assault charge.

The third claim is that he "trusted" his attorney's advice to sign the plea agreement which stated he admitted to being a habitual offender. He contends counsel did not inform him he could be sentenced as a habitual offender. He claims counsel did not tell him that

the consequence of this admission on a plea to assault second degree would mean an eight year sentence.

Factual Background

Murray was indicted in June 2007 for assault second degree,[1] possession of a deadly weapon during the commission of a felony,[2] resisting arrest,[3] and misdemeanor criminal mischief.[4] At his final case review appearance on November 19, 2007, he rejected a plea offer from the State. The plea offer would have required Murray to plead guilty to assault second, and admit he is a habitual offender. In exchange, the State would ask for no more than eight years in jail as a habitual offender. After his rejection, trial was scheduled for November 27, 2007.[5]

Another final case review date was set for November 26th. His attorney explained to the Court on that date what had prompted Murray's change from rejecting the plea to accepting it:

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[1] 11 *Del. C.* § 612.

[2] 11 *Del. C.* § 1447.

[3] 11 *Del. C.* § 1257.

[4] 11 *Del. C.* § 811.

[5] There was a brief colloquy at final case review on the 19th during which counsel told the judge Murray and he had discussed the plea offer, and Murray had decided to reject it.

> Counsel: Your Honor, Mr. Murray is to my right. I've represented him for quite some time. We were here last week for a final case review and he turned down this same plea offer. There's been recent developments in that the victim has surfaced, been in the Attorney General's Office for an interview with Mr. Walther and spoke to him today. I then put this on for final case review today, and Mr. Murray has agreed to enter this plea in lieu of going to trial starting tomorrow.
>
> So he understands the benefit. The State is dropping weapons charge. He's pleading guilty to Assault Second. He's admitting that he is a habitual offender. The State will, therefore, file the appropriate motion and the presentence order will requested. He understands he could get up to eight years in jail. He knows the State, through Mr. Walther, is asking for eight years in jail. The minimum for a person in his situation is a two-year minimum mandatory because of his prior felonies.[6]

The prosecutor then read the plea agreement into the record. It was identical to the one Muray had rejected on November 19th. The Court reviewed the complete plea agreement with Murray and questioned him about the TIS Guilty Plea form he had signed. The TIS form did not have any information about habitual offender consequences. There was (1) no mention of a possible life sentence and (2) that he faced a minimum sentence of eight years on the assault charge if declared a habitual offender. Instead, the sentencing information on the form said the minimum sentence was two years. Murray stated counsel had read the TIS form to him, he had read it himself, and understood everything on it. After he did, he signed it. At the Court's request, Murray also re-read the list of trial and

[6] Plea Transcript of November 26, 2007, at 2 – 3.

appeal rights. He said he understood them and that he understood a guilty plea meant he gave up all the listed rights.

The Court first made sure Murray understood that, absent being declared a habitual offender, the maximum sentence for assault second degree is eight years. But because the sentencing information on the form was erroneous if Murray were declared a habitual offender, the Court also made sure (1) he knew as a habitual offender he could receive a sentence of up to life, and (2) that because assault second was a violent felony, the minimum sentence he would get would be eight years if declared a habitual offender.[7] He said he understood all that. Murray also stated no one had promised or guaranteed him what his sentence would be.

Murray indicated to the Court he had had enough time to talk to his lawyer about the original charges against him. He also said he was satisfied with his lawyer's advice. When asked if he had any questions about his guilty plea or the trial and appeal rights he was giving up, he replied, "No sir, Your Honor."[8] The plea was accepted.

Prior to sentencing, through separate counsel, Murray moved to withdraw his guilty plea. A hearing was held on the motion on January 30, 2008. The grounds in the motion were:

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[7] 11 *Del. C.* § 4214(a).

[8] Plea Transcript at 7.

> On January 15, 2008, Defendant sent a letter to his prior counsel indicating that he wished to withdraw his acceptance of the plea offer. His reasons for wishing to withdraw the plea offer are as follows:
>
> a) he never got to explain his side of what happened and he was not asked;
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> b) it was never explained to him that he could be sentenced as habitual offender and that the sentencing guidelines would change as a result;
>
> c) he believes the case would have gone differently had he not signed the plea;
>
> d) he was manipulated to sign the plea; and
>
> e) his family investigated and counsel did not try to negotiate a different plea, "and the story you told me about the DA and the victim was not true."[9]

Two people testified at the hearing: Murray and the attorney about whom he complained in his motion to withdraw and in his current motion for postconviction relief. Murray while testifying reiterated the claims raised in his motion and provided more details about them. He said his lawyer told him he would only get a two year jail sentence on the assault charge. This assertion is buttressed, he said, on the fact that the TIS Guilty Plea form states the minimum sentence is two years. The record shows that the TIS form has a two year "minimum" sentence listed twice, once under the column "SENTAC Guidelines" and again where the question is asked what is the minimum sentence. Murray

[9] Motion to Withdraw Guilty Plea, Docket #15.

testified that he had only read the penalty portion of the TIS form.

Murray testified he became fixated on the two year provision. He admitted that the habitual offender issue was "on the table," but he did not believe it would be a factor. When cross-examined about the sentencing issue, the prosecutor read to him this exchange between the Court and Murray during the earlier plea colloquy:

> Court: Do you understand that the maximum sentence normally for Assault Second Degree is eight years in jail?
>
> Murray: Yes.
>
> Court: Do you understand further that if you are declared to be a habitual offender by this Court, at the request of the State you could receive a sentence of up to life imprisonment?
>
> Murray: Yes.
>
> Court: Do you understand that because this is a violent felony, you must receive a minimum of eight years?
>
> Murray: Yes.
>
> Court: Has anybody promised you or guaranteed you what the sentence of this Court will be?
>
> Murray: No.[10]

Two of Murray's other claims for being allowed to withdraw his plea were that he was "manipulated" into pleading guilty and that the assault victim had not been in the prosecutor's office as his defense counsel had been told. His family, Murray testified, had

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[10] Plea Transcript, November 26, 2007, p. 7.

learned the victim had not been in the prosecutor's office. The victim was a sixty-two year old letter carrier. No family members, however, testified at this hearing.

Murray never denied being out at the scene of what had apparently started as a domestic dispute. But he stated he had pinned his hopes for a more favorable outcome of the charges on the victim not appearing. Other than that approach, Murray offered no other strategy or defense, such as self-defense. When trial counsel testified he confirmed the victim's non-appearance was the defense strategy.

The alleged plea "manipulation" claim is also related to his claim he never got a chance to explain his side. There are several aspects to these assertions. One relates back to Murray's allegation that he did not believe he need to worry about habitual offender. Part of this assertion has been discussed above in the recitation of the plea colloquy. Murray had three prior felony convictions before this case. All were pleas. As far as not having a chance to tell his side, Murray testified at the hearing he was familiar with his trial rights and knew he was surrendering them by pleading. At the hearing, Murray was reminded that during the plea colloquy, the Court asked him to re-read the list of trial appeal rights appearing on the TIS Guilty Plea form. When he finished reading them at the time of the plea, he reported to the Court he understood them. One of the rights listed is "to present evidence in your defense."

Trial counsel testified about all the claims. He said, as noted earlier, that the "defense" was premised on the victim not showing up. Counsel said he had discussed the habitual offender issue with Murray on three separate occasions. One occasion was on

November 19, 2007 at Final Case Review when he rejected the same plea offer - in written form[11] - as he accepted on November 26, 2007.[12] Counsel also testified that he had told Murray he faced a minimum jail sentence of eight years because assault second was a violent felony and because of the habitual offender law.[13]

The TIS Guilty Plea form has several questions that were pertinent to Murray's motion to withdraw his plea which are summarized as follows:

1. Murray answered "Yes" to the plea being free and voluntary;

2. Murray answered "No" to the question if anyone had promised him what his sentence would be;

3. Murray answered "Yes" to the question asking if he were satisfied with this lawyer's representation and had fully advised him of all his rights.

While testifying, Murray was reminded that during the plea colloquy he said he had time to talk to his lawyer about all the charges against him, and that he was satisfied with his counsel's advice.

This Court found no fair and just reason under Superior Court Criminal Rule 32(d)[14] to allow or enable Murray to withdraw his plea. This Court recognized that the TIS Guilty Plea form was silent and inadequately filled out as to any habitual offender sentence

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[11] State's Hearing Exhibit, #2.

[12] State's Hearing Exhibit, #3.

[13] 11 *Del. C.* § 4214(a).

[14] *Scarborough v. State*, 928 A.2d 644, 649 (Del. 2007).

consequences. This deficiency, as noted in its ruling denying the motion to withdraw, prompted the Court during the plea colloquy to insure that Murray (1) understand that he faced potential habitual offender status, (2) if so declared, he faced a minimum eight year sentence, and (3) a possible sentence of up to life. In sum, this Court found despite the incorrectness and deficiencies in the TIS form, Murray fully comprehended the maximum sentencing consequences.

The Court noted the plea agreement's language in its ruling. The plea agreement in this case stated in pertinent part:

> Sentencing Recommendation/Agreement:
>
> Defendant admits he is a habitual offender 4214(a)
> 8 years L-5 4214(a)[15]

A plea agreement is a contract.[16] Barring reasons to the contrary it must be fulfilled based on contractual principles.[17] This plea agreement was fulfilled. Murray signed it and during the plea colloquy said he understood it. The Court explained the State still had to file a motion to have him declared a habitual offender.

The State filed that motion, and Murray was sentenced on February 1st. Another judge at sentencing granted the State's motion. There is no record Murray saw a basis to challenge the criminal record history set out in the motion. Key to his motion and

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[15] Plea Agreement, Docket #10.

[16] *Cole v. State*, 922 A.2d 354, 359 (Del. 2005).

[17] *Id.*

specifically to Murray's claim of an unfulfilled plea agreement, the sentencing judge imposed an eight year sentence on him as a habitual offender. Such a sentence is precisely what was stated in the Plea Agreement Murray signed. Nothing was unfulfilled.

Subsequent to his sentencing on February 1, 2008, Murray did not appeal the denial of his motion to withdraw his guilty plea.

Before reviewing the claims Murray now makes in his motion for postconviction relief, the Court must consider any potential procedural impediments to doing so.[18] Since Murray did not appeal his conviction and sentence, it became final for Rule 61 purposes thirty days thereafter.[19] As Murray's motion was filed on September 19, 2008, it was within the one year time limit.[20]

But there is a bar to considering his current motion and that arises because all of the claims he now make have been previously adjudicated. Formerly adjudicated claims are barred.[21] He now, of course, has re-labelled these former claims under the umbrella claim of ineffective assistance of counsel. This Court will not reconsider "repackaged claims."[22]

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[18] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

[19] *Jackson v. State*, 654 A.2d 829, 832-33 (Del. 1995).

[20] Superior Court Criminal Rule 61(i)(1).

[21] Superior Court Criminal Rule 61(i)(4).

[22] *Skinner v. State*, 607 A.2d 1170, 1172 (Del. 1992).

There is a relief to the bar of former adjudication. This Court can consider such claims where the interests of justice warrant it.[23] The court sees no such interest here. Murray had a full evidentiary hearing on his motion to withdraw. He chose not to appeal the denial of that motion. He has offered nothing new.[24]

Conclusion

For the reasons stated herein, defendant Antoine Murray's motion for postconviction relief is **DENIED**.

IT IS SO ORDERED.

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J.

[23] Superior Court Criminal Rule 61(i)(4).

[24] Murray's claim of ineffective assistance of counsel means he must demonstrate (1) counsel's performance fell below some objective standard of reasonableness, and (2) he was prejudiced; that but for counsel's professional error he would have to gone to trial. *Guinn v. State*, 882 A.2d 178, 181 (Del. 2005). The Court in this opinion has considered that counsel's errors in filing out the TIS Guilty Plea form were a breach of a professional standard. But Murray cannot meet the prejudice prong of this claim. That was determined against him in the earlier proceeding when (1) his defense relied on the victim not appearing, which fell apart when he did, and (2) the Court's corrective action during the plea colloquy to insure Murray fully understood and appreciated all of the ramifications of becoming a habitual offender. Indirectly, of course, the claims made in his motion to withdraw, on which the Court ruled against him, were of ineffective assistance.